BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEAN ZURRIN, Claimant, v. GARDEN VALLEY CONSTRUCTION, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 99-019102** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Signed: November 9, 2004

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on April 13 and April 15, 2004. Andrew M. Chasan of Boise represented Claimant. Alan K. Hull of Boise represented Defendants. The parties submitted oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The matter came under advisement on July 7, 2004 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of permanent impairment, and the extent thereof; and

2. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant has sustained some disability in excess of impairment as a result of a June 25, 1999 industrial accident. Claimant asserts that she is entitled to permanent total disability pursuant to the odd-lot doctrine. Defendants concede that Claimant has sustained substantial disability in excess of her impairment, but contend that she is not totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Shaun Byrne, Bryan E. Zurrin, Leroy H. Barton, III, and Mary Barros-Bailey taken at the hearing;

2. Joint exhibits 1 through 25; and

3. Post-hearing deposition of Robert F. Calhoun, Ph.D.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 43 years of age and resided with her husband and the youngest of her four children in Garden Valley, Idaho.

Education

2. Claimant attended school in Boise through the eleventh grade. She left school at the end of her junior year in 1979. In 1981, Claimant obtained her GED. Subsequent to receiving her GED, Claimant pursued an office occupations course through Boise State

University. In the program, Claimant learned to operate office equipment, type, and use a ten-key. She studied filing methods and how to manually post to accounting ledgers for payroll, accounts payable, and accounts receivable. She also studied business math and business writing. Claimant did not receive her certificate of completion due to an "incomplete" in an accounting class.

3. Claimant attended Treasure Valley Community College in Ontario, Oregon, and received a certificate as a flagger. Claimant kept her certificate current with required training and renewals until her industrial accident.

4. Subsequent to her industrial accident, Claimant engaged in some self-study and self-directed on-line activities to improve her computer skills.

Employment History

5. While attending high school, Claimant worked weekends as a maid in a Garden City motel.

6. For several years, Claimant provided assistance at a day care run by her mother, and for about three years she ran her own licensed day care. In her own operation, Claimant cared for four or five children at a time from age newborn to five.

7. Claimant worked full-time for Emerald Care Center in Boise for approximately two years. During the time that she was employed there, Claimant worked in housekeeping, the laundry, and, for a short time, in the office where she did filing, answered phones and performed general clerical work.

8. Claimant left Emerald Care Center and relocated to the Magic Valley where she found employment as a cook in a nursing home. She held the position for about a year until she became pregnant with her youngest child.

9. While living in the Magic Valley, Claimant also served as an on-call driver for a visually impaired individual.

10. Claimant relocated to Garden Valley in 1990 or 1991 and has maintained her residence there since that time. Claimant testified at hearing that her first job upon her return to Garden Valley was at Terrace Lakes. She worked as a waitress, bartender and lifeguard. The work was somewhat seasonal and her duties varied depending upon the season. Claimant earned $5.00 an hour for her work at Terrace Lakes (plus tips when working as a waitress or bartender).

11. Claimant next went to work as a laborer at Ward's Greenhouse. She planted, stocked orders, loaded trucks and operated a tractor. Claimant earned $5.75 per hour at the greenhouse, where she remained until approximately 1995.

12. In 1995, Claimant went to work for Employer as a flagger. Claimant worked for Employer for four years until the date of her industrial injury. Her wages varied depending upon the particular project but generally ranged from $15.00 per hour to $25.00 per hour. The work was seasonal, but with seniority there was some work available year-round.

Accident and Nature of Injuries

13. On June 25, 1999, Claimant was working for Employer in Twin Falls, Idaho, on a construction project when she was struck, and then run over, by a backhoe. Claimant was transported to Magic Valley Regional Medical Center in Twin Falls where she was stabilized. She was then flown by Life Flight to St. Alphonsus Regional Medical Center in Boise. Claimant's injuries included a crushed pelvis, fractured sacrum, lumbar fractures at L4-5, a crush injury to the right thigh, back, and buttocks with extensive degloving, a closed head injury with subdural hematoma, right orbital bone fracture, fractures of the second, third and fourth left

metatarsals, hypotension resulting from blood loss and hemorrhagic shock as a result of blood flow into the retro peritoneal space.

14. On the date of injury, Claimant underwent open reduction and internal fixation of the right pubic rami using a pelvic reconstruction plate, along with a stabilization of the right sacral fracture with a cannulated screw. On July 3, she underwent a second surgery to stabilize a lateral compression-type left hemisacral fracture with a screw and washer. On July 13, Claimant underwent a third surgery, this time to drain a large seroma that had formed as a result of the degloving injury. Claimant underwent several more procedures to drain the seroma during the course of her recovery.

15. Claimant was in the hospital for twenty-five days. She was confined to a wheelchair for approximately six weeks, and used a walker for three more months until she was able to walk with a cane. She was not able to drive until some six months post accident.

16. Claimant was given 3% whole person impairment for her pelvic fracture; 9% whole person impairment for her skin disorder (a result of the degloving injury); and 16% whole person impairment (8% pre-existing) for cognitive impairments. The combined impairment for these three ratings is 26% of the whole person.

17. Claimant has permanent work restrictions as a result of the accident. Erik D. Stowell, M.D., Claimant's rehabilitation physician, provided the following restrictions:

> . . . Jean should be able to tolerate an eight hour workday with standing limited to four hours, up to 30 minutes continuously, walking up to 2-4 hours but only short distances at a time. She should be restricted to only occasional bending, stooping, squatting, crouching or kneeling. Her lifting should be limited to 20 pounds occasionally above shoulders desk to chair [sic] and 25 pounds chair to floor. Carrying should be limited to 27 pounds occasionally and limited to 50 pounds pushing and pulling on an occasional basis.

Exhibit 5, page 57. Dr. Stowell noted that Claimant needed to follow up with Dr. Calhoun to

address any residual cognitive deficits.

18. Dr. Calhoun was the neuropsychologist on Claimant's treatment team. At the conclusion of her treatment, he opined that Claimant had cognitive deficits that were attributable to her accident. In particular, she demonstrated deficiencies in vocabulary, ability to perform mental arithmetic, ability to concentrate and handle interruptions and distractions, verbal short-term memory, executive function, and complex problem solving. Dr. Calhoun specifically addressed a number of work situations that would not be appropriate for Claimant as a result of her cognitive deficits. He advised that Claimant should avoid jobs that involved complex social or work situations, jobs that required dealing with several customers at the same time, jobs that involved time pressure or prolonged stress, jobs that required multi-tasking or frequent shifting of tasks, jobs that required problem-solving, and jobs that required flexibility or adaptability.

19. Claimant's physical restrictions placed her in a light work category with some additional positional limitations. Her identified cognitive deficits further narrowed the universe of jobs for which Claimant was qualified.

Work Search

20. Surety referred Claimant's case to the Industrial Commission Rehabilitation Division (ICRD) on July 22, 1999. Rehabilitation Consultant Shaun Byrne was assigned to the case. Mr. Byrne worked closely with Claimant, her medical team, and Employer throughout her recovery period and as she attempted a trial return-to-work.

21. Dr. Stowell cleared Claimant for a return-to-work trial in March 2000. Although Employer was supportive and remained in contact with Claimant throughout her recovery, it did not have any light duty work available for Claimant. In April 2000, Claimant worked for five hours answering phones in the office. In May, Dr. Stowell eased Claimant's restrictions,

opening the door for her to attempt a limited return to flagging for short periods of time. It was not until June 9, 2000 that Employer had a suitable opportunity for a work trial as a flagger. Claimant attempted to work as a flagger on that date. She was unable to complete the trial due to her physical limitations and her fear of being re-injured. Claimant attempted another trial as a relief flagger, and had to stop after a short time due to her physical restrictions. Dr. Stowell later testified that he had overestimated Claimant's physical abilities and did not appreciate the full extent of her physical limitations at the time he had released her for the trial return to her time-of-injury job. There is now no dispute that Claimant could not return to her time-of-injury occupation as a flagger and Employer had no other work available within her restrictions.

22. Following her failed trials as a flagger, and partly as a result thereof, Claimant's work search efforts were nominal, at best. Mr. Byrne met with Claimant and Employer on July 19, 2000. During the meeting, Mr. Byrne suggested that Claimant apply at several staffing agencies. Claimant expressed her belief that some refresher classes in personal computing would make her more marketable. She also indicated that she was currently without reliable transportation. Following the meeting, Mr. Byrne identified some educational resources that might answer Claimant's request for computing classes, but Surety declined to pay for the classes because Claimant already had basic computer skills. Claimant did contact one of the staffing agencies and obtained a copy of a computer manual for Windows 98, which she studied on her own.

23. Claimant did a fair job of staying in touch with Mr. Byrne through the end of the year. She continued to have transportation problems intermittently throughout the remainder of the year. In August, she traveled to Oregon on family matters. In September, Claimant helped her sister with preparations for opening a day care. She reported to Mr. Byrne that her benefits

had stopped since she had been determined to be medically stable and she couldn't afford to travel to Boise to pursue her contact with the staffing agency. In October, Claimant was not well, was helping her pregnant daughter, and was taking care of her grandchildren. She was again without transportation. In November, Claimant spent some time at her sister's home in Kuna. Claimant scheduled a meeting with Mr. Byrne for November 30. At the meeting, Claimant reported that she still did not have reliable transportation, she had no income, and she needed to return to work. She was to go directly to the staffing agency following their meeting. In December, Claimant changed residences and was unable to pursue any job search activities.

24. Mr. Byrne contacted Claimant next on January 22, 2001. She reported that she had "no money, no car" and no ability to pursue work in Boise. She said there was no work available in Garden Valley. She had started some free computer classes on the Internet. When Mr. Byrne contacted Claimant next in March 2001, she advised that she was performing in-home child-care part-time, and hoped to purchase reliable transportation with her tax refund. In May, Mr. Byrne met with Claimant at her home. She was still doing in-home child-care, was helping care for her grandchildren, and was assisting one of her children with driver's education. She reported that her husband was working full-time and was gone long hours. Claimant was still limited in what she could do without having pain in her hips or swelling in her lower extremity. She advised Mr. Byrne that she was not interested in pursuing employment, either in Garden Valley or Boise at the present time. Accordingly, Mr. Byrne closed Claimant's file.

25. In January 2001, Claimant began receiving compensation for providing in-home day care for the children of a neighbor and for her sister-in-law. At the same time, she also provided child-care for her daughter for which she was not paid. Claimant performed no child-care between August 2001 and December 2001. She stopped because the responsibilities took

too much of a toll on her. The work was too physically demanding and the distraction of having multiple children in her care affected her ability to concentrate and provide the supervision the children needed. Claimant provided some in-home child-care for which she was compensated between January 2002 and May 2003. Since May 2003 she has provided child-care only for her grandchildren, and has done so without compensation.

26. Claimant renewed her work search in February 2002. Her efforts were diligent, if not particularly dynamic, through May 2002. Claimant regularly checked Job Service postings and classified ads on line and regularly called the staffing service to check on available jobs. In March, she picked up applications for two local businesses, filled them out, and made further inquiries as to the physical requirements of the jobs. Claimant was out of state much of June on family business, and shortly after her return she was involved in the trial of her third-party liability case. From August 2002 through the end of the year, Claimant was working as a child-care provider but still regularly checked Job Service and the *Idaho Statesman* classifieds on line.

27. From April 21, 2003 through June 2003, Claimant was actively engaged in a work search. She continued to work with the staffing agency and signed up with a second agency. She frequently checked Job Service listings and contacted the staffing agencies. In April she inquired about two cashier openings, both of which had been filled. She called on two additional positions in June, both of which were filled.

28. During this same period Mr. Lee Barton, a vocational expert retained to provide an opinion on Claimant's disability, was pursuing employment options on her behalf as well. Mr. Barton enlisted the assistance of Mr. Byrne, and personally investigated some of the jobs that might be available in Garden Valley. All that he investigated were precluded by Claimant's work restrictions. In the Treasure Valley, Mr. Barton investigated the availability of light

production work and found that most positions required standing in excess of 30 minutes at a time. Inquiries were made at a convenience store, grocery chain, and big box retailer, none of which had positions within Claimant's restrictions. Even the position of greeter at Wal-Mart exceeded Claimant's work restrictions. Mr. Barton also followed up with the staffing agencies, which confirmed that there was nothing available that met Claimant's restrictions.

29. As a result of the deposition of Mr. Barton taken in October 2003, Mr. Barton was given the directive to try one more time to find suitable employment for Claimant: "Find her a job if one's available." Tr., p. 294. Mr. Barton and Ms. Matter, an associate of Mr. Barton's, assisted Claimant in developing a resume, cover letters, and interview skills. They researched the availability of personal care attendant positions in both Garden Valley and the Treasure Valley area. They found job openings and referred Claimant to them. They assisted in filling out applications, and following up with staffing agencies and potential employers. They made contacts with potential employers on Claimant's behalf. During November and December 2003, Claimant applied for positions at two department stores, an insurance agency, several major hotel/motels, and an inventory company. She made follow-up contacts with all of them, some multiple times. Claimant interviewed with the inventory company and attended an orientation program, but the work required too much standing. She interviewed with Shopko and was offered a position but declined the position after Ms. Matter contacted Shopko and learned that the job required Claimant to be on her feet constantly. Claimant contacted several of the hotel/motels regarding front desk positions and learned that they required standing in excess of her restrictions. During this time, Claimant was also looking on-line at Job Service and classified ads.

30. At the same time Claimant was offered the job at Shopko in Boise, she obtained a

temporary, part-time personal care attendant position in Garden Valley. The position ended after a couple of weeks because the client's health improved and he no longer needed her services.

31. In January 2004, Claimant regularly contacted the staffing agencies, checked bulletin boards in the Garden Valley area, applied on-line for positions listed with Job Service, and met with Ms. Matter to fill out job applications.

32. In February, Claimant applied at six different home health care agencies, one of which, Progressive Nursing, regularly provides services in the Garden Valley area. Claimant placed her name on a contact list for personal care attendant with Progressive in the local area. She met weekly with Ms. Matter, regularly checked bulletin boards at local gathering places including the Crouch Merc, Garden Valley Library, and post office. She continued regular contact with the staffing agencies. She followed up on applications to the home health agencies. She called about two part-time teacher's aide positions at the school, both of which were filled. One of the staffing agencies had two positions, one of which required standing in excess of her restrictions and one for which Claimant did not meet the minimum typing requirement. She applied for a position at the Garden Valley Library and didn't meet the minimum requirements. At the end of the month, Claimant interviewed with Guardian Home Care.

33. In early March, Claimant was contacted by Guardian Home Care regarding an opening in Boise. She was hired part-time to provide support for residents who needed some assistance but functioned mostly independently. She was to be paid $7.50/hour. The position included some light cooking and cleaning in a nine-person facility as well as dispensing pre-packaged medications. Claimant attended the required medications class, and then began work. Mr. Barton and Ms. Matter observed Claimant at work on March 19. At that time, she had the assistance of her supervisor in performing duties that she would be expected to perform

independently. In the two hours that Ms. Matter watched her work, she was not able to sit down once. At the time she started the position, only five of the nine beds at the facility were filled. One resident was in a wheelchair and Claimant was required to load the wheelchair into a vehicle for the resident. During their observation, Mr. Barton and Ms. Matter were concerned that Claimant was required to dispense and chart medication accurately while also preparing the meal, getting people seated, and getting them served. Claimant left the position after only a few days because she developed leg, back and hip pain from standing and lifting in excess of her restrictions. At the time she left employment, she was being counseled by her supervisor for failure to chart medications properly. At hearing, Mr. Barton observed that a job that had appeared to be a good fit with Claimant's abilities turned out to require far more physically and mentally than Claimant was capable of providing.

34. After the work attempt with Guardian Home Care, Mr. Barton and Ms. Matter explored the possibility of "sitter" positions—when someone is hired to just sit with and observe someone in a hospital or home needing constant monitoring but no intervention or assistance. They learned that the agency that hires in the Garden Valley area does provide sitters, but they don't hire sitters—they hire individuals who are expected to be able to provide home or institutional attendant services. Such positions invariably include the possibility of performing assisted transfers of patients (getting them in and out of bed or a chair, getting them in and out of the bath or shower and on and off of the commode), an activity that would exceed Claimant's restrictions.

35. At the time of hearing, Claimant was working four hours per week at $7.00/hour assisting an individual who was disabled. The job involved primarily providing companionship for the individual one afternoon a week and preparing a meal.

Expert Vocational Opinions

36. In January 2001, Claimant retained Mr. Lee Barton as a vocational expert to render an opinion as to Claimant's loss of earning capacity as a result of her industrial accident. His initial report is dated September 25, 2002. In preparing the report, he reviewed medical records, met with Claimant and Drs. Stowell and Calhoun, spoke with Employer, reviewed ICRD case notes, and the results of the functional capacity exam completed August 14, 2001. Mr. Barton also reviewed Claimant's educational history, vocational history, and wage history, together with the labor market in the Garden Valley area. Mr. Barton determined that Claimant's pre-injury wage in the five years preceding her accident averaged $18,720. Based on her earnings post-accident, Mr. Barton determined that she could expect to earn approximately $1,500 per year providing child-care services. He calculated this to be a 92% loss of access to the job market. He further opined that it was more probable than not that Claimant's physical limitations together with her cognitive losses and a limited labor market (Garden Valley) made suitable work unavailable in her job market on a regular and continuous basis.

37. Mr. Barton updated his vocational report by letter dated August 11, 2003. During the time since his first report, Mr. Barton had reviewed Dr. Calhoun's testimony presented at the civil trial. That testimony prompted Mr. Barton to arrange a meeting with Dr. Calhoun and Mr. Byrne to discuss Claimant's cognitive limitations. Dr. Calhoun reviewed a labor market survey that Mr. Byrne had prepared that identified a number of positions in Boise as well as Garden Valley that Mr. Byrne believed would be suitable for Claimant. Dr. Calhoun determined that with the exception of light production work and convenience store clerk, none of the identified jobs was appropriate for Claimant.

Additionally, Mr. Barton did further investigation of job opportunities in the Garden Valley area. Ms. Matter contacted some potential employers in Boise and followed up with the staffing agencies. Finally, in June 2003, Mr. Barton, Mr. Byrne, and Ms. Matter met to discuss Claimant's job search and determined that they had "touched all the bases that were available to touch." Tr., p. 293. At hearing, Mr. Barton testified, "We came to a consensus of opinion that there had been a good effort put forth, both by [Claimant] and by job developers, and that continued search would be futile." *Id.*

38. Mr. Barton prepared a final addendum to his vocational report on April 2, 2004. The additional information covered all of the efforts made by Mr. Barton and Ms. Matter from November 2003 until the end of March 2004. These efforts are summarized in findings of fact 28 through 33, herein. Mr. Barton reiterated his opinion that Claimant was permanently and totally disabled. At hearing, Mr. Barton testified about Claimant's job search:

> You know, we did an exhaustive job search on her behalf. She participated fully. She drove down from Garden Valley at least once a week to fill out applications, to visit with potential employers, to talk with us about her job-seeking strategies, and to meet with people, to interview with them. We turned over every stone that we could think of turning over to look for a job for [Claimant].
>
> I have rarely been involved with such a comprehensive job search for one individual. It wasn't only the efforts of Mrs. Matter and myself and Mr. Byrne from the Industrial Commission, which went on over a period of years; but it was really an intense search in the last four months or so, since last November [2003]. And, again, I would just—I just want to say I was really impressed with the effort that [Claimant] put into the search. It's not easy to keep going out and be told "no" day after day.

Tr., p. 301. Mr. Byrne, too, expressed his belief that Claimant had done all that had been asked of her, particularly with regard to her efforts in 2002 and 2003.

39. In the early spring of 2004, Defendants retained Mary Barros-Bailey, a vocational expert, to evaluate Claimant's disability. In preparing her report, Ms. Barros-Bailey had access

to the medical records, the expert testimony of Drs. Calhoun and Stowell at the civil trial, the deposition of Dr. Meier taken in lieu of his testimony at trial, the records from ICRD and at least the first two reports prepared by Mr. Barton.[1] Ms. Barros-Bailey met with Claimant for a lengthy clinical interview. Her restatement of Claimant's social, educational, work and medical histories are consistent with those of Mr. Barton and the record. Of note, at the time that Ms. Barros-Bailey prepared her report, Claimant was working at Guardian Home Care. The report does not reflect that Claimant was ultimately unable to perform the job because it exceeded her restrictions.

40. Ms. Barros-Bailey strongly recommended some retraining for Claimant as one way to enlarge an admittedly limited universe of suitable jobs. Ms. Barros-Bailey concluded:

> While retraining might provide [Claimant] with a greater number of options that [sic] the small number she currently has access to, due to the combined residual physical and vocational profile, she has sustained a significant loss of access to the labor market as well as a substantial earning-capacity loss resulting in a disability. Whether considering direct placement or retraining options, I believe this disability, inclusive of impairment, to be between 66 and 85 percent.

Exhibit 21, p. 579. At hearing, Ms. Barros-Bailey firmed up her opinion:

> Q. [By Mr. Hull] Okay. And do you have an opinion as to how much access to the labor market she has lost?
>
> A. I think it's significant. I think it's about *at least 85 percent.*

Tr., p. 396. (Emphasis added.)

41. While admittedly limited, Ms. Barros-Bailey opined that a labor market for Claimant did exist and that there were opportunities for employment. Included within that labor market were a number of employers or positions such as: the Garden Valley Motel, companion

[1] Mr. Barton's final report and Ms. Barros-Bailey's report were both dated April 2, 2004. It is not clear from the record whether Ms. Barros-Bailey had access to Mr. Barton's report, but it seems unlikely.

attendant sitter positions like those discussed previously in both Garden Valley and Emmett, substitute teacher, substitute educational assistant and substitute teacher's aid with the school district, making ribbon flowers at home for Camille Beckman, and production work for Camille Beckman. Ultimately, Ms. Barros-Bailey opined she thought that Claimant's best opportunity for employment was as a companion attendant sitter, followed by light industrial such as that at Camille Beckman. With appropriate retraining, Ms. Barros-Bailey believed that Claimant could expand those options somewhat.

DISCUSSION AND FURTHER FINDINGS

Permanent Total Disability

42. For workers' compensation purposes, total disability means an inability to sell one's services in a competitive market. Appropriate considerations in making such a finding include both medical and non-medical factors, such as age, gender, education, training, usable skills, and economic and social environment. *Hamilton v. Ted Beamis Logging & Const.,* 127 Idaho 221, 899 P.2d 434 (1995). There are two ways to establish permanent total disability.

> First, a claimant may prove a total and permanent disability if his or her medical impairment *together with the nonmedical factors* total 100%. If the Commission finds that a claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical factors, there is no need for the Commission to continue. The total and permanent disability has been established at that stage. See *Hegel v. Kuhlman Bros., Inc.*, 115 Idaho 855, 857, 771 P.2d 519, 521 (1989) (Bakes, J., specially concurring) ("Once 100% disability is found by the Commission on the merits of a claimant's case, claimant has proved his entitlement to 100% disability benefits, and there is no need to employ the burden-shifting odd lot doctrine").

Boley v. State, Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997) (emphasis added). By relying solely on the odd-lot argument to establish total permanent disability, Claimant concedes that she is not 100% disabled.

Odd-Lot Doctrine

43. An employee is disabled under the odd-lot doctrine if she proves that, while she is physically able to perform some work, she is so handicapped that she would not be employed regularly in any well-known branch of the labor market absent a business boom, sympathy of a particular employer or friends, temporary good luck, or superhuman effort on her part. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). When, as in this matter, evidence of a claimant's employability is in dispute, the claimant bears the burden of establishing a *prima facie* case of odd-lot status. *Huerta v. School Dist. #431,* 116 Idaho 43, 773 P.2d 1130 (1989). An employee may prove total disability under the odd-lot worker doctrine in one of three ways:

> (1) by showing that [she] has attempted other types of employment without success;
>
> (2) by showing that [she] or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available; or,
>
> (3) by showing that any efforts to find suitable employment would be futile.

Hamilton, 127 Idaho at 224, 899 P.2d at 437 (Citations omitted).

> If the evidence of the medical and nonmedical factors places a claimant *prima facie* in the odd-lot category, the burden is then on the employer or surety to show that some kind of suitable work is regularly and continuously available to the claimant.

Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 584 38 P.3d 617, 622 (2001). This shifting of the burden requires more than identifying types of positions that generally exist in the labor market. The employer or surety must introduce evidence that there is an actual job within a reasonable distance from a claimant's home that he or she is able to perform or for which he or she can be trained. Further, the employer or surety must show that a claimant has a reasonable

opportunity to be employed at that job. *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 407, 565 P.2d 1360, 1364, (1977).

44. The Referee finds that Claimant has established a *prima facie* case for odd-lot status. As discussed below, Claimant has established that she meets not just one, but all three of the alternative tests for establishing odd-lot status.

Attempts at Employment

45. Following her injury, Claimant attempted to return to her time of injury employment. It was work for which she was well suited, it was work she enjoyed, and it paid very well. When a trial return to flagging was unsuccessful, Claimant turned to work with which she had some experience—child-care. From January 2001 until August 2001, she cared for two young children on a regular, but not full-time basis. She also provided occasional back-up child-care services for her sister-in-law. Claimant stopped providing day care in August 2001 because she found the work too physically demanding, and because she believed that she could not supervise multiple children safely or responsibly. Claimant reluctantly resumed some limited in-home child-care in December 2001 and did so intermittently until May 2003. Claimant testified that she turned down a lot of child-care work during this period because of her physical problems and her concerns about safety. Since May 2003, Claimant has provided child-care only for her grandchildren and has done so without compensation.

46. Claimant's next attempt at employment was as a companion attendant to an elderly gentleman for a short time in December 2003. Claimant testified that she was able to perform this job and that it was within her restrictions. In his testimony at hearing, Claimant's husband disputed her assertions, noting that when he spoke with her by phone from Baltimore she complained that the work exacerbated her pain. *See,* Tr., p. 261.

47. Claimant's next job was with Guardian Home Care. Even though the vocational experts involved in her case believed the job was ideal for her, she was forced to quit after only a few days. Objective observation of the work by Mr. Barton and Ms. Matter established that the work required was far in excess of Claimant's physical restrictions.

48. At the time of hearing, Claimant was working four hours per week as a companion attendant for a disabled individual in Garden Valley. Nothing in the record suggests that Claimant has any trouble performing in this position.

49. Claimant attempted five jobs since her injury, including her time of injury position. Child-care proved too difficult, as did the work at Guardian Home Care. Claimant's success with companion attendant positions was mixed, depending on the particular situation. Given the limited number of suitable positions available for Claimant even in the wider job market, the Referee finds it remarkable that Claimant actually worked or attempted work in four different jobs as well as her time of injury position. The Referee finds that Claimant has attempted alternative employment. With the exception of her current position, which requires only four hours per week, Claimant's attempts to return to work have been unsuccessful—even when experts deemed the position ideal for her.

50. Claimant is a credible witness. Her cognitive impairments were evident during her testimony: she had virtually no memory for dates without reference to source documents; she had difficulty in answering complex questions or questions that were subject to more than one interpretation; she frequently wandered away from the question and had to be refocused; she often struggled to find a particular word or phrase that she needed to answer a question. Despite the evident difficulties, it was clear that she was doing her best to answer the questions and her answers were remarkably consistent throughout the record and the hearing.

Availability of Suitable Work

51. Claimant's job search efforts were the subject of much discussion during the hearing, and were a primary focus of the briefing as well. Defendants characterize Claimant's efforts as "sporadic and lackadaisical." Defendants' Post-Hearing Response Brief, p. 3. They argue that Claimant failed to devote the time and energy required for a successful job search. The Referee is not persuaded by Defendants' argument. A number of considerations must be taken into account in judging Claimant's job search. First, it is undisputed that Claimant's labor market is extremely small, even when one includes the Treasure Valley. Claimant's limitations make a daily commute to Boise a hardship. Of the limited number of positions suitable for Claimant's abilities, only a few will be unfilled and available to Claimant at any given time.

It is also unreasonable to expect Claimant to approach a work search in the same way that counsel, or the vocational experts might. Dr. Calhoun's determination that Claimant was of low-average intelligence is undisputed. Claimant worked hard to be an average student in school. She didn't graduate from high school, but she did get her GED. Virtually every job Claimant obtained from high school on was the result of word of mouth, connection through family or friends, or other fortuitous means. Many of the cognitive skills necessary for a directed, thorough and professional job search were lost to Claimant in the accident.

The record also shows that even after being released to work, Claimant was clinically depressed. Her depression was due in part to her accident and injuries, and in part to stress in her domestic life. Considering the seriousness of her injuries, her loss of income, a long hospitalization and even longer recovery, and her neurocognitive problems, it would be naive to think that the pre-existing domestic stresses were not exacerbated by the accident and its aftermath. In hindsight, Dr. Stowell admitted that he had overestimated Claimant's physical

abilities and it was not until she completed the FCE in August of 2001 that the full extent of her physical limitations was identified. Similarly, Dr. Calhoun admitted at Claimant's civil trial in 2002 that he had underestimated her neurocognitive deficits and their effect on Claimant's life. Taken as a whole, the record paints a picture of an individual who, in the year following her release, was not physically, emotionally, or mentally capable of any real job search, much less the focused and resolute search Defendants seemed to expect.

As Claimant regained her strength and her depression abated, her efforts to find a job also picked up. By February 2002, Mr. Barton had been retained. Between February and July 2002, Claimant had signed up with a staffing agency, and was regularly checking for job openings online. She contacted several employers to inquire about availability of suitable jobs, completed at least one job application, and undertook some self-directed training on the Internet.

In May 2003, Mr. Barton characterized Claimant's efforts as "diligent." Exhibit 22, p. 598. Behind the scenes, Mr. Barton and Mr. Byrne renewed their efforts at finding suitable employment for Claimant. Mr. Byrne prepared a labor market survey identifying a number of types of positions that he believed would be suitable for Claimant. Mr. Barton and Mr. Byrne met with Dr. Calhoun in January 2003 to review the labor market survey. Dr. Calhoun nixed all but two types of work as unsuitable for Claimant—light industrial production or convenience store clerk. Mr. Barton, Mr. Byrne, and Ms. Matter contacted a number of these employers. They followed up with the staffing agencies, and were in regular contact with Claimant. None of these efforts met with any success. By June 2003, Mr. Byrne, Mr. Barton, and Ms. Matter agreed that Claimant "had been doing a credible job search for a substantial period of time. We also agreed that a continued job search in her labor market would be futile." *Id.,* at 599.

In October 2003, despite the earlier consensus of futility, Mr. Barton was given the assignment to "[f]ind [Claimant] a job if one's available." Tr., p. 294. Thus began an intensive three-month job search that led to Claimant's fleeting employment with Guardian Home Care, and her current position as a (very) part-time companion attendant. No full-time, regularly available work could be found. Mr. Barton opined in April 2004 that the availability of personal care or companion attendant positions was spotty and unpredictable. He noted that many such positions required lifting, transfers, or stand-by transfers of patients. No suitable production jobs were found.

At hearing, Defendants challenged the seriousness of Claimant's job search, suggesting that Claimant dropped out of the labor market in 2001 when the economy in Garden Valley was strong and her chances of employment were better and that she failed to contact each and every business listed in the Garden Valley Guide. Neither point is persuasive. As discussed previously, a job search by Claimant in 2001 may not have been a realistic goal in light of her physical and mental condition. Did Claimant and those working on her behalf inquire about every single possible position that might exist within a fifty-mile radius of Garden Valley? Of course not. Nor would it be realistic to do so. Defendants concede that Claimant's access to the labor market is extremely limited. Claimant and her vocational counselors focused their search on the narrow market created by her restrictions. It was reasonable for Claimant to target employers most likely to have suitable positions.

Finally, Defendants suggested at hearing that Claimant should become self-employed as a personal care attendant or companion. It was evident to the Referee at hearing that although Claimant is honest, conscientious, and hard-working she simply does not have the wherewithal

to develop, market and engage in full-time personal attendant work, even if the demand were sufficient to provide continuously available work.

Search Would be Futile

52. Twice, in June 2003 and again in April 2004, three vocational professionals determined that it would be futile for Claimant to continue searching for work. Shaun Byrne, ICRD Consultant, has years of experience in returning injured employees to work. Unlike Mr. Barton or Ms. Barros-Bailey, Mr. Byrne is a neutral participant in the return-to-work process. Mr. Byrne began working with Claimant long before either Mr. Barton or Ms. Barros-Bailey came upon the scene, and continued to provide information, support, and expertise long after the ICRD file was closed. In June 2003, he agreed with Mr. Barton that further search for work for Claimant would be futile.

Initially, Mr. Barton was retained only for the purpose of determining Claimant's loss of access to the job market. Mr. Barton's charge broadened until he was directed to find Claimant a job. He could not. There is no reason to believe that Mr. Barton would not have done everything he could to complete the job he was assigned and for which he was, undoubtedly, well recompensed. Ms. Matter, who worked most closely with Claimant in the final, intensive job search, also agreed that any additional effort would be futile. Mr. Barton is a credible witness who, at the end of the day, had a personal stake in getting Claimant a job—his reputation. Even with his professional standing on the line, he could not find regular work for Claimant.

Ms. Barros-Bailey was also a credible witness. Her role was limited, however, and ultimately she was not able to discredit either Claimant's attempts at locating work or the

opinions of Mr. Byrne, Mr. Barton, or Ms. Matter that further effort would be an exercise in futility.

Suitable Work Regularly and Continuously Available

53. As previously discussed, once a Claimant has made a *prima facie* case for odd-lot status, the burden shifts to the Defendants to show that suitable work is regularly and continuously available to Claimant. This, the Defendants have failed to do. Defendants presented a great deal of demographic data to illustrate that the population of Boise County is growing and is growing older. Defendants then postulate that with an increasingly older population, there will be increasing demand for work as a personal care attendant or companion. It must be pointed out that the demographic data presented represents Boise County, a large rural county with several population centers, of which Garden Valley is only one. Whether the countywide data is consistent with the demographics of Garden Valley in particular is unknown. More importantly, identifying a demographic trend is not sufficient to overcome the Claimant's *prima facie* showing of odd-lot status. Even if Defendants' predictions about the Garden Valley population trends are dead on, it does not demonstrate the availability of continuous and regularly available work, or an actual job that Claimant stands a reasonable chance of obtaining *now*. Defendants have identified only one *actual* job that was available at the time of hearing—a part-time seasonal position at the Garden Valley Motel. Defendants made no showing that Claimant had a reasonable chance of obtaining (or retaining) even this marginal employment. Therefore, the Referee finds that Defendants have failed to overcome Claimant's showing of a *prima facie* case for odd-lot status.

Disability in Excess of Impairment

54. Because the Claimant is permanently and totally disabled under the odd-lot doctrine, there is no need to address the alternative issue of partial permanent disability in excess of impairment.

CONCLUSION OF LAW

1. Claimant is permanently and totally disabled under the odd-lot doctrine.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this 9th day of November, 2004.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2004 a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

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